STATE OF MICHIGAN

COURT OF APPEALS

NARAYAN VERMA, M.D.,

Plaintiff-Appellant/Cross-Appellee,

v

THOMAS GIANCARLO, D.O., Individually and as an Agent of Lakeshore Neurology, P.C.,

Defendant-Appellee/Cross-Appellant,

and

LAKESHORE NEUROLOGY, P.C., Jointly and Severally,

Defendant.

UNPUBLISHED
December 12, 2000

Nos. 208534, 208907
Wayne Circuit Court
LC No. 96-628935 NZ

Before: Whitbeck, P.J., and White and Wilder, JJ.

PER CURIAM.

In this case alleging tortious interference with an advantageous business relationship and economic expectancy, civil conspiracy, and violation of the Anti-Trust Reform Act (MARA), MCL 445.771 *et seq.*; MSA 28.70(1) *et seq.*, plaintiff appeals as of right the circuit court's order granting defendant summary disposition of all claims (No. 208534). In consolidated case No. 208907, plaintiff appeals by leave granted the circuit court's order granting defendant's motion for taxation of expert witness costs. Defendant cross-appeals the circuit court's determination that plaintiff's action was not frivolous, and challenges the predecessor circuit court judge's determination that the professional review nondisclosure statutes, MCL 333.20175(8); MSA 14.15(20175), MCL 333.21515; MSA 14.15(21515), and MCL 331.533; MSA 14.57(23), did not apply to this action. We affirm the dismissal of plaintiff's claims, vacate the grant of defendant's motion to tax costs, and remand for further proceedings regarding the amount of costs awarded. Regarding defendant's cross-appeal, we affirm the circuit court's determination that plaintiff's claims were not frivolous.

I

Plaintiff is a licensed physician and is board-certified in neurology, neurophysiology, internal medicine, electroencephalogram (EEG) and evoked potentials, and sleep medicine. Plaintiff was a member of the faculty at Wayne State University (WSU) from 1984 until 1990, where he served as instructor, assistant professor and associate professor of neurology, and was also a staff neurologist and conducted sleep research at the Veterans Administration (VA) Medical Center. Plaintiff served as medical director for the Epilepsy Center of Michigan until 1994, and then entered private practice. He is licensed to practice medicine in Michigan, Indiana and California and has published approximately seventy articles and abstracts, and several book chapters. When he entered private practice, plaintiff applied for, and received without incident, staff privileges at Beaumont Hospital, Detroit Medical Center, Macomb Hospital Center, and Providence Hospital.

Defendant Giancarlo was at pertinent times chief of the neurology section at St. John Hospital, and had been a resident under plaintiff at WSU until approximately 1988. Until approximately late 1995 or 1996, defendant was in private practice with another staff neurologist at St. John, Dr. Haranath Policherla (both were shareholders in former defendant Lakeshore Neurology, P.C.).

Plaintiff submitted an application for hospital privileges and appointment to the medical staff at St. John Hospital in late August 1994. As requested on the hospital's application, plaintiff provided names of four references, all medical doctors with whom plaintiff had worked or trained. Two of plaintiff's references were at St. John Hospital, one was the chief of neurology at Beaumont Hospital, Royal Oak, and the fourth was a neurologist in private practice in the Detroit area. The four submitted professional reference questionnaire forms, recommended plaintiff "without reservation," and rated him on all questions as either "outstanding" or "good."[1]

---

[1] In the section on communication and cooperation skills, the questionnaire asked for ratings in four areas:

1. The individual's verbal and written fluency in the English language is:

2. (a) The applicant's ability to communicate verbally with patients is:

2. (b) The applicant's rapport with patients would generally be described as . . .

3. The applicant's ability to work/cooperate/communicate with other physicians, nurses, students, allied health professional, and administration and support staff is generally.

Three of the four doctors rated plaintiff as "good" in all four areas, and the fourth doctor rated him "outstanding" in three areas and "good" in the fourth area.

St. John Hospital solicited references from several professionals plaintiff had not named as references, including the chief of neurology at the VA Medical Center, where plaintiff had been a staff neurologist and conducted sleep research, and the chair of the neurology department at WSU, who was also a professor of neurology. Both recommended plaintiff "without reservation."

In the interim, St. John Hospital granted plaintiff temporary medical staff privileges, for 120 days, by letter to plaintiff from Dr. Wilson, Senior Vice President for Medical Affairs.[2] Plaintiff then began seeing patients at St. John Hospital.

Defendant became aware that plaintiff had received temporary staff privileges, and communicated to Dr. Wilson, who was the chair of the Department of Medicine, of which the neurology section was a part, and who sat on several of the St. John committees that were to review plaintiff's application for privileges (Department of Medicine Credentials Committee and Executive Committee), that he had concerns regarding plaintiff's ability to get along with others.

Shortly after plaintiff was granted temporary privileges, defendant completed a reference questionnaire on plaintiff and submitted it for consideration by the various credentials committees. Defendant recommended that plaintiff not be awarded privileges, rating his ability to work, cooperate and communicate with others as "poor," and stating in an "additional comments" section that plaintiff had many fine skills and abilities as a research/academic neurologist, "[h]owever, in the clinical setting where patient care is critical and the ability to interact well with medical colleagues is important he has definite limitations and would be a liability."

Defendant secured a negative reference regarding plaintiff from Dr. Policherla, who had also been a resident under plaintiff at WSU, and provided Dr. Wilson with the names of four additional persons to contact regarding plaintiff. Dr. Wilson sent letters to those persons dated November 16, 1994, requesting that they complete reference questionnaires, and stating that "[y]our name has been given by the applicant as a personal reference." Three of the persons responded, in December 1994 and January 1995. The three recommended that plaintiff not be

---

[2] By letter dated October 6, 1994, Dr. Wilson wrote plaintiff:

> We are this date granting you temporary privileges in the Department of Medicine, Section of Neurology. The Chief of the Section is Thomas Giancarlo, D.O.
>
> These privileges are for *120 days (expire 2/6/95* [)] and in no way prejudge the actions of the credentialing committee on your pending application for staff privileges.

awarded privileges and stated highly negative opinions regarding plaintiff's ability to get along with others.[3]

---

[3] One of the four (No. 1) testified at deposition that defendant called her and said the hospital needed a *more recent* reference for plaintiff and asked if she had worked under plaintiff's supervision at the Veteran's Administration Hospital. No. 1 had worked with plaintiff on a dementia project at the VA Hospital six years before she was asked to complete the reference form regarding plaintiff in December 1994. She stated in her questionnaire that she would not recommend plaintiff, and gave plaintiff ratings primarily in the "marginal," and "average" categories. Regarding plaintiff's ability to work, cooperate, and communicate with others she rated him "poor." In a section for additional comments, she wrote: "I am reluctant to provide info [sic information] because Dr. Verma has done several thing to frighten and intimidate me in the past and I fear that if I am completely candid he would attempt to harm my career."

The second person (No. 2), who had a master's degree in public health, testified that she had never spoken to defendant and that she received a reference form from Dr. Wilson. No. 2 did not complete the section of the questionnaire asking for a general recommendation, and stated on the questionnaire that she had "insufficient information to answer fully." She stated in the questionnaire that she had no information available regarding plaintiff's "professional knowledge, skills, and attitude," and "citizenship," and noted that she was not a medical doctor. No. 2 rated plaintiff's communication and cooperation skills with two "average" scores, one "good" score, and a "marginal" score for plaintiff's ability to work, cooperate, and communicate with others.

The third person (No. 3) apparently did not complete the reference questionnaire, instead writing a letter to Dr. Wilson dated January 31, 1995 which stated:

> . . . I have been familiar with Dr. Verma for a number of years as faculty at Wayne State University in the Department of Neurology. Overall, I have not directly worked with him in regard to patient care in a clinical setting. My contact with him was through the electrophysiology laboratory at Harper Hospital. I have generally heard from others that he is clinically competent. My own observations indicate that he is a competent electrophysiologist, particularly with regard to electroencephalography. I do not believe he has extensive experience with electromyography.
>
> Over the years, I have experienced numerous difficulties in his relationship with subordinates and colleagues. In his capacity as director of the Holden Neurosciences Lab, he was disliked by every technician and secretary in the Department for behavior they considered to be abusive and derogatory of the subordinates. During the time that I was familiar with his activities, he avoided participating in the regular clinical activities of the neurology department such as ward rounds and routine clinics.

(continued...)

Plaintiff presented to the circuit court the deposition testimony of Dr. Policherla that defendant asked him for the names of persons who would write negative references regarding plaintiff, asked him to submit his own reference questionnaire regarding plaintiff's application for staff privileges, and told him how to complete the questionnaire. Dr. Policherla submitted his questionnaire regarding plaintiff in late November 1994, recommending plaintiff be denied privileges and rated plaintiff's communication ability as "marginal" and plaintiff's availability for and thoroughness in patient care as "poor," while rating his medical knowledge as "good."

By letter dated March 21, 1995, plaintiff was notified, after the various pertinent hospital committees had considered his application for privileges,[4] that the Executive Committee of St.

(...continued)

> Dr. Verma was involved in a sleep lab and I have on numerous occasions spoken with [two doctors] who collaborated with him on this effort. [One of them] has an extensive file about Dr. Verma's complete inability to work with colleagues and his inappropriate behavior. Eventually, he was removed from this position. . . . I have also been told that Dr. Verma was asked to leave the Epilepsy Center of Michigan because of inability to work with people on the staff there although this is definitely a matter of hearsay indirectly through other colleagues.
>
> I am preparing this letter in utmost confidentiality and assume it will be maintained as such. In my working in the electrophysiology lab, I found Dr. Verma to be reasonably polite with me but never was able to establish any collaborative efforts with him. He seemed more interested in extracting information from me that would aid in his own research. Much of the information described above is based on numerous conversations over several years with other individuals that have had dealings with Dr. Verma. I can only attest to the consistency of the reports I obtained from as many as 20 or more individuals.
>
> I trust you will find this information helpful.

What little personal knowledge No. 3 expressed in his reference letter of plaintiff's communication skills was not unfavorable-- that in his dealings with plaintiff, plaintiff had been "reasonably polite." The negative statements No. 3 stated in his questionnaire were not based on personal knowledge, but rather, reflected information he had allegedly been given by others.

[4] Saint John's Hospital Department of Medicine Credentials Committee, of which Dr. Wilson was chair, met on March 2, 1995 and the minutes of that meeting reflect the committee's assessment that plaintiff "not be appointed to the medical staff because his credentials review indicates he has difficulty in maintaining harmonious and productive inter-personal relationships with other physicians and hospital personnel." The hospital's Credentials Committee, whose members did not include Drs. Wilson or Giancarlo, met on March 7, 1995, and the minutes of that meeting reflect that the committee "concurs with department recommendation not to appoint to the medical staff because of inability to maintain harmonious relationships with colleagues." Minutes of the Executive Committee meeting of March 15, 1995, of which Dr. Wilson was a

(continued...)

John Hospital would recommend to the Board of Trustees that his application for privileges be denied pursuant to the Hospital's Bylaws concerning qualifications because of his inability to maintain harmonious and productive relationships with physicians and hospital personnel. Plaintiff withdrew his application for privileges by letter dated April 18, 1995, and did not pursue the hospital's appeal process.

II

Plaintiff filed his complaint in June 1996, alleging that as a result of his extensive medical credentials, years of practice and teaching, special experience and skills, and the hospital's decision to grant him temporary staff privileges, there was a reasonable likelihood, and plaintiff had a realistic expectation, of future economic benefit from the practice of medicine at and an advantageous business relationship with St. John Hospital. The complaint further alleged that defendant individually and as an agent of his professional corporation, Lakeshore Neurology, undertook wrongful acts designed to interfere with plaintiff's advantageous business relationship with, and expectancies regarding, the hospital; that defendant's wrongful acts were undertaken for the purpose of eliminating competition from plaintiff; and that defendant set about to secure the denial of plaintiff's application by making disparaging comments, soliciting other medical professionals to wrongfully conspire against plaintiff, and conspiring with other physicians to wrongfully deny plaintiff's application.

In July 1996 plaintiff voluntarily dismissed Lakeshore Neurology, P.C., which, according to defendant's answer, was in the process of dissolution.

Defendant filed his first motion for summary disposition in October 1996, arguing that he was immune from liability under Michigan's peer review statute, MCL 331.531; MSA 14.57(21), and the Health Care Quality Improvement Act (HCQIA), 42 USC 11111 *et seq.*; that plaintiff's claims essentially sought review of a private hospital's denial of staff privileges and were thus nonreviewable; that because defendant acted in the course of his duties and there was no third-party involvement plaintiff's conspiracy and tortious interference with an advantageous business relationship claims failed; that plaintiff lacked antitrust standing, that plaintiff's claims were not ripe and he failed to suffer actual damages because he withdrew his application for privileges before it was denied and did not pursue administrative appeal rights before filing suit.

Plaintiff attached to his response to defendant's motion his affidavit, which stated in pertinent part:

> 6. Following the submission of my application to St. John, I was informed that Defendant Giancarlo undertook a personal effort to attempt to secure the denial of my application by maliciously soliciting negative and untrue letters and comments

---

(...continued)
member, recommended that plaintiff not be appointed due to "his inability to maintain harmonious relationships with colleagues."

about me from other medical professionals for submission to members of the St. John staff for consideration as part of my application.

7. . . . I was informed that Defendant Giancarlo was going out of his way to make me look bad to those considering my St. John application and that Defendant Giancarlo was undertaking the aforesaid malicious personal conduct not in the interest or for the benefit of St. John and its medical staff but, rather [,] to enhance his own personal business and income by suppressing and or eliminating potential competition from me.

8. The aforesaid malicious personal conduct undertaken by Defendant Giancarlo was confirmed to me in person by former business associates of Defendant Giancarlo who also are licensed medical professionals, and these individuals also informed me that Defendant Giancarlo intentionally undertook his aforesaid malicious conduct in a manner designed to insulate the result of his efforts from discovery in a civil legal action.

* * *

10. Because of the . . . intended recommendation [of the St. John medical staff executive committee to deny my application for privileges] I was forced on April 18, 1995 to withdraw my application for staff privileges in order to prevent the denial of staff privileges and the false and malicious basis for that denial from becoming a permanent part of a national data bank, which would have a profoundly negative impact on my ability to practice medicine.[5]

---

[5] Plaintiff also submitted below a signed, witnessed, and notarized memo of Ronald Kneiser, plaintiff's non-litigation attorney, stating in pertinent part:

> At 8:10 p.m. last night, August 2, 1995, I met with Dr. Verma and Dr. Polacherla [sic] at the Peacock Restaurant on Maple Street in Dearborn, Michigan.
>
> Dr. Polacherla [sic] is a staff neurologist at St. John Hospital. Dr. Polacherla [sic] informed me that he had regular division meetings with Dr. Giancarlos [sic], chairman of the division of neurology, St. John Hospital. Both Polacherla [sic] and Giancarlos [sic] were former neurology students of Dr. Verma. During this past year at one of these meetings, Dr. Giancarlos [sic] stated that, "Verma has applied for privileges." Giancarlos [sic] then proceeded to state that he met with Dr. Wilson, Chairman of the Department of Internal Medicine at St. John Hospital, to discuss the process of obtaining a denial of such privileges. Dr. Wilson informed Dr. Giancarlos [sic] that letters of information were not discoverable in court. Therefore, if Dr. Giancarlos [sic] obtained a number of negative letters, the hospital would be in a position to deny Dr. Verma privileges. Dr. Giancarlos [sic] then listed out for Dr. Polacherla [sic] six or seven names of

(continued...)

The court denied defendant's first motion for summary disposition without prejudice in December 1996, on the ground that discovery remained open, and because plaintiff alleged that defendant took actions outside the scope of his duties as chief of neurology and outside a legitimate peer review process.

In October 1997, the case was reassigned to a different circuit judge. Defendant filed his second motion for summary disposition, and the circuit court dismissed all claims. Over plaintiff's objection, the circuit court granted defendant's subsequent motion for taxation of expert witness costs of approximately $27,000. Plaintiff appealed the circuit court's order granting summary disposition to this Court and sought leave to appeal the order taxing expert costs. A third circuit judge denied defendant's subsequent motion for entry of judgment in a May 5, 1998 order stating that "all issues related to Defendant's taxed bill of costs and expert witness fees are preserved until all appeals in this case have been finally resolved."

III

The circuit court's dismissal was apparently based on immunity under the peer review statutes, MCR 2.116(C)(7), and on MCR 2.116(C)(10), insufficient evidence to raise a genuine issue of fact whether defendant acted outside the peer review process.[6]

(...continued)

> those who might be interested in writing negative letters about Dr. Verma. Dr. Polacherla [sic] provided his input to Dr. Giancarlos [sic] as to each of these recommendations.
>
> At a future date, Dr. Giancarlos [sic] gave Dr. Polacherla [sic] a negative reference letter regarding Dr. Verma in some sort of an evaluation format. Dr. Polacherla [sic] stated that if such form had stated that Dr. Verma was technically incompetent, he would not have signed the document. Dr. Polacherla [sic] stated that since there was no challenge to Dr. Verma's technical competence, he would sign the negative evaluation form. He signed that form and has expressed regret about doing so.
>
> At the next moment in time, Dr. Polacherla [sic] states that he found out that Dr. Verma had withdrawn his application for privileges.
>
> Dr. Polacherla [sic] went on at length about the business problems he and Dr. Giancarlos [sic] were having and the number of ways in which Dr. Giancarlos [sic] took profits and titles from Dr. Polacherla [sic]. Dr. Polacherla [sic] stated that before signing any documents stating that this all had happened, he wished to have his counsel review the documentation.

[6] The circuit court ruled from the bench:

(continued...)

(...continued)
Dr. Verma wants privileges at St. John Hospital. He makes application in the Neurology Department.

Giancarlo had trained under Verma some years earlier. Therefore, no. By definition, Giancarlo, who is now Chief of the Neurology Divison [sic] would be advised of anyone who would like to have privileges in that division or department, and would have a role to play as to whether or not that individual should be there or not, whether it be someone he knew or not know [sic].

Okay. When he finds out, he says, oh, no, the man is technically gifted, competent, intelligent, clinically a disaster. That is to say he can't deal with people and can't deal with patients, doesn't do well with staff.

Well within Giancarlo's, not only prerogative, any physician could have made that contribution, but Giancarlo had a duty as Chief to make those observations, an affirmative duty.

And so advise the Vice-President who conducts these, Dr. Wilson. Dr. Wilson says if you – like anyone who's making an application, you write up a nice resume and you give letters that are favorable to you, you rarely submit letters that are not favorable to you or references that are not favorable. It's an odd individual who would say let me submit some references that are not favorable to my endeavor.

Wilson says if you know anybody that knows anything, I want to know about it. There is nothing as a matter of law in this world that does not permit Giancarlo to say, I know folks who had nothing but problems with this fellow and who don't think very highly of him, let me tell you who they are.

Nothing wrong in the world with Giancarlo calling and saying you're going to be hearing from Wilson, are you willing to communicate?

The law of Michigan, we have a statute, because we want in our hospitals, we, as a matter of public policy, exchange of information. And we want individuals to be able to freely exchange that information that says, I'm sorry – and I think it's confidential, I'm sorry, but this doctor is not very good. He could hurt a patient. He could actually injure a patient by way of – as a surgeon.

Well, along with that is, by the way, yeah, he might be technically competent to cut, he might be a fine neurologist, technically, but we'll have a real problem within getting along with patients and getting along with staff, that, by definition, goes to patient care also. We have a statute on the subject, because we think that's so important to be able to exchange that information.

(continued...)

(...continued)
The tragedy of this and the tragedy of earlier rulings in this case is that the statute was just pushed aside, ignored, not even ruled on adequately.

And, instead, one of the writers who had written in confidence said I'll tell you what I think of Verma, but I'm doing it because it's in confidence. I wouldn't do it if it wasn't [sic] in confidence. Here's the problem. And then he goes on to recite. That's the tragedy of this case. That statute was completely ignored.

That doctor has now been deposed, that letter was exposed. That doctor has even been subject to deposition, for heaven sakes, for writing a candid response that was to be treated in confidence and assured that it was in confidence. And had a right to rely on the law of Michigan that it was in confidence. Thrown right out the window.

Verma received a response that said – by Wilson, traditionally now, we've looked at this thing, we're not inclined to give you your Privileges [sic] at this hospital.

However, our provisions are that you have a right to another committee review. A different body. A different committee than the ones who already looked at you. And you can even have a lawyer involved in the process.

Verma does nothing. Withdraws his request for privileges. And I believe it was at least a year and a half later he then turns around and sues Dr. Giancarlo, it was certainly not needed [,] far from it.

And then, it shotguns this thing and says Giancarlo was out to get me personally. And, of course, even there, he's got a little problem because he's got to go one more step for something specific. Why would Giancarlo –well, economic. Okay.

Now, that you've been allowed to develop this lawsuit, what have you got to back it up?

Answer: A theory. Nothing. Not a thing. We have caused people to spend thousands upon thousands upon thousands of dollars.

If this Plaintiff wasn't well off, I don't know that we would have this lawsuit here, I don't know that. Last year he made some $300,000, this Plaintiff did.

It's none of my business, I don't care. But this is in every respect, both by way of law and fact, and I have some working knowledge on the subject matter, since the fundamental case, for example, on tortious interference is Feahney [sic Feaheny]. The other case is Woody v Tamer (ph), 1 and 2, I'm Woody v Tamer 2.

This was a shame, sad, abuse. If there ever was a case that bordered on frivolous, this is it in every particular and in every way shape and form.

(continued...)

This Court reviews a circuit court's ruling on a motion for summary disposition de novo. *Sewell v Southfield Public Schools,* 456 Mich 670, 674; 576 NW2d 153 (1998). In deciding a motion brought under MCR 2.116(C)(7), the court must consider all documentary evidence submitted by the parties, and "the contents of the complaint must be accepted as true unless specifically contradicted by the affidavits or other appropriate documentation submitted by the movant." *Id.*, quoting *Patterson v Kleiman,* 447 Mich 429, 432, 434 n 6; 526 NW2d 879 (1994). The difference between motions under subsection (C)(7) and (C)(10) is that a movant under (C)(7) is "not required to file supportive material, and the party opposing the motion is not required to respond in kind." *Patterson, supra* at 434 n 6.

A summary disposition motion brought under MCR 2.116(C)(10) tests the factual support of a claim, and is subject to de novo review. *Smith v Globe Life Ins Co,* 460 Mich 446, 454; 597 NW2d 28 (1999). The circuit court must consider affidavits, pleadings, depositions, admissions and documentary evidence filed or submitted by the parties in the light most favorable to the nonmovant. *Id.*, quoting *Quinto v Cross & Peters Co,* 451 Mich 358, 362-363; 547 NW2d 314 (1996). If the affidavits or other documentary evidence show there is no genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Smith, supra* at 454, quoting *Quinto, supra.*

Under the Public Health Code, hospitals have the duty to provide for internal review of the professional practices of physicians granted staff privileges. *Attorney General v Bruce,* 422 Mich 157, 164; 369 NW2d 826 (1985), citing MCL 333.21513; MSA 14.15(21513). Hospitals are obligated to "assure that physicians . . . admitted to practice in the hospital are granted hospital privileges consistent with their individual training, experience and other qualifications." MCL 333.21513(c); MSA 14.15(21513)(c). MCL 331.531; MSA 14.57(21), provides in pertinent part:

> Sec. 1. (1) A person, organization, or entity may provide to a review entity information or data relating to the physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider.
>
> (2) As used in this section, "review entity" means 1 of the following:
>
> (a) A duly appointed peer review committee of 1 of the following:

(...continued)

> Now, I am not going to find for this as frivolous. I am granting summary as to all counts. And, of course, it would be the Plaintiff's decision, perfectly well within his rights to take me up on appeal.
>
> But because I did not find it frivolous, it may very well be the Defendants who would like to take me up on appeal for not finding it frivolous.
>
> I might have been in error there.

* * *

(iii) A health facility or agency licensed under article 17 of the public health code . . .

* * *

(3) A person, organization, or entity is not civilly or criminally liable:

(a) For providing information or data pursuant to subsection (1).

(b) For an act or communication within its scope as a review entity.

* * *

(4) The *immunity from liability provided under subsection (3) does not apply* to a person, organization, or entity that acts *with malice*. [Emphasis added.]

Separate and apart from the peer review immunity statutes, there is a judicial nonreview doctrine. The judicial nonreview doctrine was articulated in *Hoffman v Garden City Hospital-Osteopathic*, 115 Mich App 773, 778-779; 321 NW2d 810 (1982), quoting *Shulman v Washington Hospital Center*, 222 F Supp 59 (D DC, 1963)[, *remanded with instructions* 121 US App DC 64; 348 F2d 70 (1965), *aff'd on reh* 319 F Supp 252 (D DC, 1970)]:

> "The action of hospital authorities in refusing to appoint a physician or surgeon to its medical staff, or declining to renew an appointment that has expired, or excluding any physician or surgeon from practising in the hospital, is not subject to judicial review."[7]

---

[7] In *Hoffman, supra*, the plaintiff physicians brought suit against the defendant hospital, individual members of the hospital's board of trustees, and individual staff physicians, alleging that the hospital's denial of staff privileges to them was arbitrary, capricious and unreasonable because it was based on a conspiracy to protect the financial interests of the individual staff members, in violation of the predecessor to the MARA, 445.701 *et seq.;* MSA 28.31 *et seq.* This Court adopted the "nonreviewability" doctrine, noting:

> . . . . Most jurisdictions remain faithful to the general rule that a private hospital has the power to appoint and remove members at will without judicial intervention.
>
> In one of the earlier and one of the strongest statements on this issue, the Court in *Shulman* [*supra*], concluded that the decisions of the governing bodies of private hospitals are not subject to judicial review. As in the case at bar, *Shulman* involved a suit against a private hospital questioning the power and authority of a hospital to preclude a physician from membership on the staff of the hospital. The Court stated:

(continued...)

In *Sarin v Samaritan Health Center*, 176 Mich App 790; 440 NW2d 80 (1989); the plaintiff brought a contract claim against the defendant hospital for violation of its bylaws in considering his staff privileges, a tortious interference claim against individual staff members, alleging that the individuals had conspired to induce the hospital to breach the contract, and a tortious interference claim against all defendants for improperly instigating and conducting the malicious investigation of plaintiff. *Id.* at 792. The *Sarin* Court affirmed the dismissal of the plaintiff's claims against all defendants pursuant to the judicial nonreview doctrine, noting that

---

(...continued)

> "We now reach the specific question involved in the case at bar, namely, whether a private hospital has power to appoint and remove members of its medical staff at will, and whether it has authority to exclude in its discretion members of the medical profession from practising in the hospital. The overwhelming weight of authority, almost approaching unanimity, is to the effect that such power and authority exist. The rule is well established that a private hospital has a right to exclude any physician from practising therein. The action of hospital authorities in refusing to appoint a physician or surgeon to its medical staff, or declining to renew an appointment that has expired, or excluding any physician or surgeon from practising in the hospital, is not subject to judicial review. The decision of the hospital authorities in such matters is final." 222 F Supp 63.

We choose to follow *Shulman* and therefore decline the invitation to review the defendant hospital's reasons for denying staff privileges to plaintiffs.

We next address plaintiffs' restraint of trade claim. It is apparent that whether the action is pled under the statute, MCL 445.762; MSA 28.62, or under the common law, the rule of reason applies. *Barrows v Grand Rapids Real Estate Board*, 51 Mich App 75; 214 NW2d 532 (1974). The trial court announced that it had considered the various factors discussed in *Barrows, supra.* Specifically, the court indicated that it had considered the facts peculiar to the business to which the restraint is allegedly applied, the condition of the business before and after the restraint was allegedly imposed, the nature of the restraint, the effect, both actual and probable, of the alleged restraint, the history of the alleged restraint, the evil believed to exist, the reason for adopting the particular remedy and the purpose sought to be obtained. After considering all of these factors the court concluded that there had not been a unreasonable restraint of trade.

* * *

We find that the trial court's decision was not clearly erroneous.

Affirmed. [*Id.* at 778-780.]

the method by which hospital personnel reached the decision on staff privileges was not reviewable. *Id.* at 794-795.

The judicial nonreview doctrine is not unlimited, however. In *Long v Chelsea Community Hosp*, 219 Mich App 578, 580-581; 557 NW2d 157 (1996), the plaintiff physician brought suit against the defendant private hospital and members of the hospital's board of trustees, alleging breach of contract, promissory estoppel, loss of consortium, and liability under the peer review statute, MCL 331.531; MSA 14.57(21). Regarding the latter claim, the plaintiff argued that the defendants were not immune from liability because they acted with malice. The *Long* Court, in considering the question whether a private cause of action for malice exists under the peer review statute and in rejecting the existence of such a cause of action, noted that the judicial nonreview doctrine is not unlimited:

> . . . . As evidenced by the statutory language, § 531 provides immunity to entities unless they act with malice. The statute's implicit purpose is to protect the participants in the peer review process. . . .
>
> * * *
>
> . . . . Courts may not review a private hospital's staffing decisions. *Sarin v Samaritan Health Center,* 176 Mich App 790, 795; 440 NW2d 80 (1989); *Regualos* [*v Community Hosp,* 140 Mich App 455; 364 NW2d 723 (1985)], at 461; *Hoffman v Garden City Hosp,* 115 Mich App 773; 321 NW2d 810 (1982); *Muzquiz v W A Foote Memorial Hosp, Inc,* 70 F3d 422, 430 (CA 6, 1995). A private hospital is empowered to appoint and remove its members at will without judicial intervention. *Sarin, supra* at 792-793; *Hoffman, supra* at 778. A private hospital has the right to exclude any doctor from practicing within it. *Hoffman, supra* at 778-779.
>
> *The above law is limited to disputes that are contractual in nature. We decline to articulate a broad principle that a private hospital's staffing decisions may never be judicially reviewed.* Indeed, in doing so, we reiterate the proposition from *Sarin* that, under some circumstances, a court may consider a hospital's decisions without violating the nonreviewability principle. *Sarin, supra* at 795. Private hospitals do not have carte blanche to violate the public policy of our state as contained in its laws. Had plaintiff in this case asserted that defendants violated state or federal law, we may have chosen to review his claim. In this case, however, plaintiff did not assert a violation of civil rights or a violation of a state statute . . . .
>
> Further, previous decisions support this reasoning. . . . [A]lthough the *Hoffman* Court refused to review the hospital's staffing decisions, the Court nonetheless examined the plaintiffs' claims of restraint of trade under MCL 445.762; MSA 28.62. [*Hoffman, supra*] at 779. Likewise, in *Muzquiz,* the Court refused to review the plaintiff's breach of contract claim under the nonreviewability standard in *Sarin,* but separately reviewed his claims of discrimination contrary to state and

federal law. *Muzquiz, supra* at 429-430. [*Long, supra* at 584, 586-588. Emphasis added.]

Thus, because plaintiff's claims of civil conspiracy and tortious interference with advantageous business relations impermissibly place at issue the staffing decisions of a private hospital, they were properly dismissed under the *Hoffman* nonreview doctrine. The nonreview doctrine does not, however, preclude review of plaintiff's antitrust claim, as recognized in *Long, supra.*

IV

Plaintiff argues his antitrust claim was improperly dismissed. Plaintiff's restraint of trade claim was asserted under the MARA, MCL 445.772; MSA 28.70(2), which provides:

> A contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful.

The MARA and § 1 of the Sherman Act, 15 USC 1, require similar evidence of concerted action or combination, thus we may look for guidance to federal precedent interpreting the Sherman Act. *Blair v Checker Cab Co,* 219 Mich App 667, 675; 558 NW2d 439 (1996).

Under § 1 of the Sherman Act, an antitrust plaintiff "must establish that the defendants combined or conspired with an intent to unreasonably restrain trade." *Id.* "[S]ection 1 does not reach unilateral conduct, even if such conduct unreasonably restrains trade." *Nurse Midwifery Associates v Hibbett,* 918 F2d 605, 611 (CA 6, 1990), mod 927 F2d 904 (CA 6, 1991), quoting *Smith v Northern Michigan Hosps,* 703 F2d 942, 949 (CA 6, 1983). This Court in *Blair, supra* at 674-675, noted that an agent or employee cannot be considered a separate entity from his principal or corporate employer as long as the agent or employee acts only within the scope of his agency or employment. *Id.*, citing *Metro Club, Inc v Schostak Bros & Co, Inc,* 89 Mich App 417, 420; 280 NW2d 553 (1979). The *Blair* Court further noted that "[f]ederal courts have found an exception to this general rule, however, where the directors have an independent personal stake in a particular action and, therefore, are actually acting on their own behalf," and construed the plaintiff's complaint as alleging that the defendant and its directors conspired to restrain trade, and that the directors had a pecuniary interest. *Id.* at 673-674. The Court therefore reversed the circuit court's dismissal of the antitrust claim under MCR 2.116(C)(8). *Id.* at 674-676.

In *Nurse Midwifery, supra* at 607, 611, the plaintiffs, two midwives, an obstetrician with whom they affiliated, and three of their clients, brought an antitrust suit against several hospitals, various members of the hospitals' medical staffs, and others. The plaintiffs' allegations included that the defendant physicians conspired for the purpose of preventing the plaintiffs from operating a maternity practice or offering nurse midwifery services at Nashville area hospitals, and that to further that objective, the physicians determined to bar the plaintiff midwives from obtaining hospital privileges. *Id.* at 607-608. The plaintiffs appealed the district court's grant of summary judgment to the defendants on all but one of the alleged conspiracies, and two of the defendant hospitals interlocutorily appealed the denial of summary judgment on the alleged

conspiracy between them. *Id.* at 607. The United States Court of Appeals for the Sixth Circuit affirmed in part and reversed in part, noting:

> [A]n agreement between officers or employees of the same firm does not ordinarily constitute a section 1 [of the Sherman Act] conspiracy, because
>
> > officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively . . . .[918 F2d at 612, quoting *Copperweld Corp v Independence Tube Corp,* 467 US 752, 769; 104 S Ct 2731; 81 L Ed 2d 628 (1984).]
>
> For the same reasons, a corporation cannot ordinarily conspire with its agents or employees. These rules have been collectively referred to as the "intracorporate conspiracy doctrine."
>
> Some courts have held that the intracorporate conspiracy doctrine does not prevent a finding of conspiracy between a hospital and its medical staff or among the members of the medical staff, because the relationships between a medical staff and a hospital or among a medical staff are different than the relationships between a corporation and its agents or among those agents . . . .
>
> The Eleventh Circuit, in *Bolt* [*v Halifax Hosp Medical Ctr,* 851 F2d 1273, 1280, vacated 861 F2d 1233 (CA 11, 1988) (en banc), reinstated in part 874 F2d 755 (CA 11, 1989) (en banc)],[8] held that members of a medical staff must be considered to be more than just officers of a corporation and are capable of conspiring both among themselves and with the hospital. 851 F.2d at 1280. The court reasoned that members of a medical staff are capable of conspiring among themselves because each member of the medical staff, unlike an officer of a corporation, "is a separate economic entity potentially in competition with other physicians." Furthermore, the court reasoned that the medical staff and the hospital are capable of conspiring together since "[a] hospital and the members of the medical staff, in contrast to a corporation and its agents, are legally separate entities, and consequently there is no similar danger that what is in fact unilateral activity will be bootstrapped into a 'conspiracy.'"

---

[8] Subsequently, *Bolt, supra,* was vacated and superseded in part by *Bolt v Halifax Hosp Med Ctr,* 891 F2d 810 (CA 11, 1990), US cert den 495 US 924 (1990), vacated 980 F2d 1381 (CA 11, 1993).

The Third Circuit, in *Weiss* [*v York Hosp*, 745 F2d 786 (CA 3, 1984)], issued a more narrow holding. As in *Bolt*, the court held that the individual members of the medical staff were capable of conspiring among themselves because they were not merely officers of the hospital but were practicing medicine in their individual capacities in competition with each other. 745 F.2d at 814-17. However, the court also held that the members of the medical staff were acting only as officers of the hospital when they made staff privilege decisions for the hospital and could not conspire with the hospital, because the medical staff was not in competition with the hospital. *Id.* at 816-817.

* * *

The issue whether the individual members of a hospital's medical staff should be treated as agents of the hospital for anti-trust purposes when making a recommendation concerning an application for staff privileges is a difficult one. Under traditional concepts of agency, members of a hospital's medical staff who, acting at the hospital's request, make a recommendation concerning an application for privileges ordinarily would be acting as agents for the hospital. It is certainly legitimate for a hospital to seek advice from its medical staff concerning the competence of a person seeking privileges at the hospital and the risks that may be incurred by the hospital if privileges were granted. On the other hand, the premise underlying the intracorporate conspiracy doctrine, that agents of a firm share a unity of economic purpose with the firm, does not necessarily apply when viewing the relationship between a hospital and its medical staff. The members of a medical staff are not salaried employees of the hospital but are independent medical practitioners, *some in direct competition with each other and with applicants for privileges. There is certainly some danger of anticompetitive decision-making when a group of physicians recommends to the hospital that an applicant who is in competition with those physicians be denied privileges at the hospital.*

For the most part, the Third Circuit's reasoning in *Weiss* seems to best achieve the objectives of the Sherman Act. *Accordingly, the intracorporate conspiracy doctrine prevents a finding of conspiracy between a hospital and its medical staff but, in certain situations, does not preclude a conspiracy among individual members of the medical staff.* Section 1 of the Sherman Act is concerned only with concerted action among competitors and not the coordinated activities that occur within a single firm. As the *Weiss* court held, when determining whether the intracorporate conspiracy doctrine applies to an alleged conspiracy between a hospital and its medical staff, there are no strong antitrust concerns that would warrant a departure from traditional concepts of agency since the hospital and medical staff are not competitors. *The fact that the medical staff may have acted with anticompetitive motives is not sufficient to warrant a finding that a hospital's decision to accept the staff recommendation is an antitrust conspiracy.*

> In contrast . . . the individual members of a hospital's medical staff are in many cases direct competitors with each other. We do not, however, agree with the *Weiss* court's conclusion that a hospital's medical staff can never be considered a single economic entity for purposes of antitrust analysis. *The fact that medical staff members may be in competition with each other does not mean that every decision of the medical staff warrants scrutiny under section 1 of the Sherman Act. When the staff as a group makes decisions or recommendations for the hospital in areas that do not affect the market in which they compete as individuals, there is no reason not to treat them as agents of the hospital. However, when competing physicians are making privilege recommendations concerning another competitor, sufficient anticompetitive concerns are raised to warrant a conclusion that the members of the medical staff are not acting as agents of the hospital for purposes of applying the intracorporate conspiracy doctrine to preclude a conspiracy among staff members.*
>
> It remains then to apply these principles to the facts in this case. With respect to the allegations that HCH and SHH [the two defendant hospitals] conspired with their respective medical staffs, for the reasons stated above, we conclude that the members of the medical staff were acting as agents of the hospital and that, therefore, the intracorporate conspiracy doctrine is controlling.
>
> In addition, with respect to the allegation that Dr. Shackleford conspired with other pediatricians on the HCH medical staff, we find that Dr. Shackleford was acting as an agent of HCH. Although Dr. Shackleford is a competitor of the other pediatricians on the HCH medical staff, their actions regarding plaintiffs' application for privileges at HCH do not relate to the market in which they compete as individuals since NMA competes with obstetricians, not pediatricians. Accordingly, the intracorporate conspiracy doctrine also applies to this allegation.
>
> We believe, however, that with respect to the allegation that Drs. Melkin, Baer, and Andrews conspired with each other and other members of the SHH [hospital] medical staff, the district court erred in concluding that Drs. Melkin, Baer and Andrews were agents of SHH. These doctors are competing obstetricians alleged to have joined together to cause SHH to deny privileges to a competitor and, therefore, are not agents of SHH for purposes of applying the intracorporate conspiracy doctrine. [*Nurse Midwifery, supra* at 614-615. Emphasis added, citations omitted.][9]

---

[9] The *Nurse Midwifery* Court declined to adopt the "personal stake" exception, stating

> We are not inclined at this point to follow several other circuits in adopting this exception in view of substantial policy reasons for not doing so. We are not convinced that an agent acting with anticompetitive motives due to some independent personal stake raises sufficient antitrust concerns to warrant

(continued...)

Applying the various principles discussed in *Nurse Midwifery*, *supra*, plaintiff failed to establish a genuine issue regarding the existence of the requisite conspiracy. There is insufficient evidence before us to conclude that Dr. Wilson was not acting purely as an agent of the hospital with respect to the staff-review process. Further, there is insufficient evidence of a conspiracy between Dr. Giancarlo and the hospital, because there is no evidence that the hospital denied plaintiff privileges in an effort to restrain trade or achieve some other unlawful purpose, as opposed to simply following the staff-review process.[10] That leaves defendant and Dr. Policherla, both of whom are neurologists, like plaintiff. The intermediate approach adopted in *Nurse Midwifery* would recognize a potential conspiracy between two economic competitors of plaintiff. However, plaintiff cannot establish that the requisite conspiracy existed at pertinent times between defendant and Dr. Policherla because they were shareholders in one professional corporation, former defendant Lakeshore Neurology, P.C., and thus must be regarded as a single economic unit. See *Metro Club, supra* at 420; *Smith, supra,* 703 F2d at 950-951. Thus, summary disposition of the antitrust claim was proper on the basis of failure to establish the requisite concert of action.

V

Because we conclude that plaintiff's common-law claims were properly dismissed under the separate judicial nonreviewability doctrine, and that his antitrust claim was properly dismissed for absence of a showing of a combination or conspiracy to restrain trade, the existence of malice is irrelevant. We therefore do not address whether plaintiff presented sufficient evidence of malice to withstand summary disposition.

Further, in light of our decision on the merits, we need not address plaintiff's argument that summary disposition would not have been properly awarded on the basis that plaintiff's claims were not ripe and were barred by failure to exhaust St. John Hospital's internal administration procedures.

Defendant's argument that should this Court find that a question of fact remained on any of plaintiff's claims, on remand the peer review statutes must be applied, requiring summary disposition, or a limitation on admissibility of evidence is also moot.

(...continued)

> abandoning the traditional rule that a principal cannot conspire with one of its agents. Accordingly, we believe that the district court correctly granted summary judgment in favor of defendants HCH, SHH, and Dr. Shackleford. [*Id.* at 615.]

[10] As the *Nurse Midwifery* court recognized, there are cases that recognized the possibility of a Sherman Act conspiracy between members of the medical staff and the hospital as separate entities. *Oltz v St Peter's Community Hospital*, 861 F2d 1440 (CA 9, 1988), rev'd in part 19 F3d 1312 (CA 9, 1994), is distinguishable on the basis that the hospital actually succumbed to pressure by the staff anesthesiologists to exclude the plaintiff nurse anesthetist for the economic advantage of the anesthesiologists. The *Oltz* court distinguished *Weiss, supra*, where the hospital and staff were acting to make staff privilege decisions.

VI

Plaintiff next argues that the circuit court abused its discretion in granting defendant's motion to tax expert witness costs of nearly $27,000 under the circumstances that the expert did not testify at a trial, and produced a single affidavit as to one count of plaintiff's complaint, in support of one of defendant's motions for summary disposition. Plaintiff also argues that the amount defendant sought was not reasonable.

Defendant brought its motion for authorization to tax defendant's expert witness fees under MCL 600.2164; MSA 27A.2164 and MCR 2.625. Attached to defendant's motion were copies of bills submitted to counsel from Lexecon, Inc., of Chicago, Illinois. The statements reflect that William Lynk, the expert economist, spent 39.75 hours on the instant case. At $350 an hour, Lynk's fees were $13,912.50. However, defendant's motion sought full reimbursement for the work of two other economists, Lynette Neumann (9.75 hours) and Omaya Ismail (1.25 hours), and for 39.5 hours for "research assistants" work, without a statement regarding what rates were charged.[11]

MCL 600.2164; MSA 27A.2164, provides in pertinent part:

> Sec. 2164 (1) No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case. Any such witness who shall directly or indirectly receive a larger amount than such award, shall be guilty of contempt of court, and on conviction thereof be punished accordingly.
>
> * * *
>
> (3) The provisions of this section shall not be applicable to witnesses testifying to the established facts, or deductions of science, nor to any other specific facts, but only to witnesses testifying to matters of opinion.

Plaintiff argues that because the expert did not testify at trial, no costs should have been awarded, and that, in any event, the amount awarded was excessive. Defendant argues that his expert's hourly fee of $350 is reasonable; that retaining an expert witness was necessary to defend the antitrust claim in light of plaintiff's insistence on pursuing that claim after defendant's first motion for summary disposition was dismissed, and that plaintiff's discovery requests on the antitrust claim included two separate sets of interrogatories and requests for production of documents directed to defendant's expert. Further, defendant argues that these requests required "a detailed analysis of extensive data regarding the factors pertinent to an antitrust claim (market

---

[11] By our calculations, Ismail and Newmann were billed at $275 per hour and the research assistants at approximately $130 per hour.

definition, market power, etc.)" Defendant also claims that because his second motion for summary disposition was brought under MCR 2.116(C)(10), it had to be supported by affidavits or deposition testimony.

Both parties rely on *Herrera v Levine*, 176 Mich App 350, 357; 439 NW2d 378 (1989). In *Herrera*, the circuit court called the case for trial after it had been on standby for trial for ten months and, because the plaintiffs were unable to proceed to trial, the court dismissed the case with prejudice, awarding costs to the defendant. *Id.* at 355. On appeal, the plaintiffs challenged the trial court's award of $1,500 in costs to the defendant, arguing that the complaint was dismissed before trial, and that no testimony was taken from the defense experts at trial or otherwise. *Id.* at 356. This Court upheld the award of $1,500, noting that:

> The language "is to appear" in § 2164 applies to the situation at bar in which the case was dismissed before defendant had a chance to call its proposed expert witnesses at trial. Furthermore, the trial court was empowered in its discretion to authorize expert witness fees which included preparation fees. *Fireman's Fund American Ins Cos v General Electric Co*, 74 Mich App 318, 329; 253 NW2d 748 (1977).
>
> The trial court's award of $1,500 in costs was approximately half of the amount requested by defendant as costs for the preparation fees of his expert witnesses, notwithstanding that neither the fact nor the amount of those expenses was challenged by plaintiffs. We find that the award of $1,500 in costs was proper even if the trial court had considered only the expenditure for expert witnesses. [*Herrera, supra* at 357-358.]

Under *Herrera*, the circuit court could properly order enhanced compensation under the statute for the expert witness' preparation. However, the record does not support an award of nearly $27,000. The bills show that only 39.75 hours were spent by expert Lynk himself. The other hours were attributed to two other economists who assisted Lynk (Neumann, 9.75 hours, and Ismail, 1.25 hours) and research assistants (39.5 hours). Defendant has not provided support for the position that these fees are properly part of the expert's fee. There is no indication that these individuals were *witnesses* who were *to appear before the court*. Moreover, focusing on subsection (3), it appears from the bills that the assistants were assembling data, and were not preparing to express an opinion. See *Century Dodge, Inc v Chrysler Corp*, 154 Mich App 537, 547-548; 398 NW2d 1 (1986). Further, as to Lynk's hours, the bills contain insufficient information regarding how much time was appropriately charged as preparation fees, as opposed to charges for time spent in assisting counsel answer the interrogatories and in consulting with counsel, which would not constitute a proper preparation fee. *Detroit v Lufran Co*, 159 Mich App 62, 65-67; 406 NW2d 235 (1987). We vacate the court's order awarding the expert witness fee and remand for further proceedings consistent with this opinion.

VII

On cross-appeal, defendant argues that the circuit court erred in declining to find plaintiff's case was frivolous so as to warrant sanctions under the HCQIA, 42 USC 11111 *et seq*., and MCR 2.625(A)(2).

We review the court's finding that the action was not frivolous for clear error. *Siecinski v First State Bank of East Detroit*, 209 Mich App 459, 465-466; 531 NW2d 768 (1995). Based on the facts as presented above, and the legal analysis, we conclude that the circuit court's determination that this matter was not frivolous was not clear error. This case did not involve pure speculation regarding defendant's motives. Dr. Policherla provided direct evidence that defendant actively injected himself into the credentials process, seeking negative reports for personal economic reasons. Further, Michigan courts have recognized the personal motive exception to the intracorporate conspiracy rule, *Blair, supra*, and the argument that the nonreviewability doctrine does not apply to this case is not a position that is devoid of arguable legal merit.

We affirm the dismissal of plaintiff's claims and the determination that plaintiff's claims were not frivolous. We vacate the grant of defendant's motion to tax expert witness costs and remand for further proceedings. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Helene N. White
/s/ Kurtis T. Wilder